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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2050/2011

Decision adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	E.L.K. (represented by Willem A. Venema)
Alleged victim:	The author
State Party:	The Netherlands
Date of communication:	25 February 2011
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 20 April 2011 (not issued in document form)
Date of adoption of Decision:	30 March 2015
Subject matter:	Expulsion of the author to his country of origin
Procedural issues:	Level of substantiation of claims
Substantive issues:	Arbitrary interference with right to private life
Articles of the Covenant:	17
Articles of the Optional Protocol:	2

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Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 2050/2011*

Submitted by:	E.L.K. (represented by Willem A. Venema)
Alleged victim:	The author
State Party:	The Netherlands
Date of communication:	25 February 2011

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights.

Meeting on 30 March 2015,

Having concluded its consideration of communication No. 2050/2011, submitted to the Human Rights Committee by E.L.K. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Decision on admissibility

1. The author of the communication is E.L.K., a national of Angola, allegedly born on 20 May 1985.[1] He claims to be a victim of a violation by the Netherlands of his rights under article 17 of the Covenant. He is represented by counsel.

Factual background

2.1 The author used to live in Angola. He arrived in the State party on 6 July 2001. On 17 July 2001, he filed an application for asylum. On 22 July 2001, the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst-IND*) rejected the author's application. On 8 August 2001, the District Court of The Hague (the District Court) declared the author's appeal founded and quashed the Immigration and Naturalisation

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

[1] The Committee notes the State party's observations that the author's age indicated in his communication is not correct and that he was assigned as date of birth 1 January 1981 (see para. 4.4 below).

Service decision of 22 July 2001. Subsequently his application for asylum was again rejected by the immigration authorities, twice overturned by the District Court and withdrawn by the Immigration and Naturalisation Service. On 4 January 2007, the Immigration and Naturalisation Service rejected his asylum request for the fifth time and on 19 July 2007 the District Court dismissed the author's appeal. On 5 September 2007, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de raad van State* – AJD) upheld the District Court's decision.

2.2 On 6 or 12 March 2008, the author submitted a request to the Immigration and Naturalisation Service for a temporary regular residence permit with a restriction "subject to the discretion of the State Secretary". He alleged that the proceedings that considered his original request for asylum had lasted six years; that the delay was attributable to the State party; and that the length of the proceedings had enabled him to develop personal and social ties in the country. During that period, he had done a year of studies in electrical engineering at the Drenthe College; joined the Jehovah's Witnesses church, where he worked; become a member of the Bargeres football club; and formed a group of friends. He claimed that he had thereby established a private life in the State party, and that in order to respect his right to a private life, he should be granted a residence permit.

2.3 On 13 March 2008, the Immigration and Naturalisation Service rejected the author's application for a residence permit pursuant to section 16 (1), of the Aliens Act since he did not hold a provisional residence permit (MVV) as required for an application for a residence permit (also known as the "MVV requirement"). It also stated that he did not qualify under any of the exceptions established by section 17 of the Act and article 3.71 of the Aliens Decree; that the so-called "hardship clause" in article 3.71 (4) was not applicable since there was no evidence that the application of the MVV requirement would give rise to an exceptional case of unfairness; and that the length of his residence in the State party and his alleged integration into Netherlands society did not exempt him from that requirement. Moreover, it was his own choice to stay in the State party without having a valid residence permit and to submit a new application for a residence permit under section 14 of the Act after his asylum request had been rejected. Finally, it stated that the refusal of a residence permit did not violate the author's right to a private and family life. The Immigration and Naturalisation Service ordered the author to immediately leave the State party as he was no longer a lawful resident.

2.4 On 13 and 31 March 2008, the author submitted an objection to the Immigration and Naturalisation Service. He claimed that the decision of 13 March 2008 was arbitrary and violated his right to private life as established in article 8 of the European Convention on Human Rights; and that the application of the MVV requirement in practice amounted to discrimination on grounds of nationality and financial resources, in violation of articles 2 and 26 of the Covenant, since aliens from certain countries—not including Angola—could be permitted to reside in the State party provided they were in possession of a residence permit, without meeting the MVV requirement. He also reiterated his arguments concerning the ties developed in the State party and argued that he no longer had any ties with family or friends in Angola. In view of the above, he requested that he be treated in accordance with the treatment of aliens as provided for in article 3.52 of the Aliens Decree.

2.5 On 15 August 2008, the author's objection was rejected by the Immigration and Naturalisation Service pursuant to section 16 (1) of the Act. It stated that the refusal of his residence permit request did not constitute a violation of his right to a private and family life as enshrined in article 8 of the European Convention on Human Rights, and that the exceptions to the MVV requirement were not a violation of articles 2 and 26 of the Covenant, since they sought to protect the State party's economic order, which was a reasonable and objective justification. It pointed out, inter alia, that the mere fact that the author had developed ties and built a life in the State party during the period in which his

asylum request was being examined did not of itself exempt him from the MVV requirement; that he had lived most of his life in Angola; and that he had never been entitled to residence in the State party. As to his contention that he had integrated into Netherlands society, the Immigration and Naturalisation Service noted that in 2004 he had been found guilty of handling stolen property under article 46 (1) of the Criminal Code and that in 2006 he had been in breach of article 30 (4) of the Motor Insurance Liability Act. Accordingly, the Immigration and Naturalisation Service stated that the author was no longer lawfully resident in the State party and ordered him to leave the country within 28 days.

2.6 On 11 September 2008, the author lodged an appeal for judicial review against that decision before the District Court. He reiterated that the denial of his request for a residence permit was arbitrary and violated his right to private and family life, and that the exemption from the MVV requirement for aliens who had the nationality of one of the countries designated by the Minister for Foreign Affairs created an unjustified distinction on the basis of nationality and financial resources, in breach of articles 2 and 26 of the Covenant.

2.7 By decision of 8 January 2009, in an interlocutory proceeding, the District Court declared the application for judicial review partly founded and quashed the contested decision of 15 August 2008 on procedural grounds, while maintaining its legal consequences. The District Court found that the appealed decision omitted to examine one aspect of the author's allegation of a breach of article 26 of the Covenant. However, after considering all his allegations, it concluded that the MVV requirement and the exceptions established in section 17 (1) of the Act, did not constitute a violation of article 8 of the European Convention on Human Rights, or articles 2 and 26 of the Covenant. Accordingly, it confirmed the legal consequences of the decision of the Immigration and Naturalisation Service of 15 August 2008.

2.8 On 5 February 2009, the author appealed against the decision to the Administrative Jurisdiction Division of the Council of State. He held that the District Court had failed to sufficiently substantiate its decision and challenged its findings, inter alia, with regard to the reasonableness and objectivity of the MVV requirement and the exception set out in section 17 (1) (a) of the Act. He reiterated that they had violated articles 2 and 26 of the Covenant. Furthermore, he pointed out that the exemption to the MVV requirement was discriminatory on the grounds of nationality and financial resources, since the Court itself accepted that its purpose was to protect the State party's economic order. He also maintained that the District Court had limited its examination of the violation of his right to family and private life by stating in general that the MVV requirement did not constitute a breach of that right, without assessing whether his deportation would constitute arbitrary interference with his private life. On 15 June 2009, the Administrative Jurisdiction Division dismissed the author's appeal.

2.9 On 14 December 2009, the author lodged an application before the European Court of Human Rights. By decision of 1 June 2010, his application was declared inadmissible by the Court, since it had not been submitted to it within the prescribed time limit.

The complaint

3.1 The author claims that he has developed personal and social ties in the State party and that his return to his country of origin by the State party would constitute a violation of his rights under article 17 of the Covenant.

3.2 He claims that he lived in the State party for six years awaiting a final decision concerning his asylum request, and that the length of the procedure is attributable to the State party. During that period, he developed personal and social ties. Notably, he studied at Drenthe College until 2005, became a member of a football club, joined the Jehovah's

Witnesses church, and formed a group of friends. In view of the above, he claimed that he should be entitled to a residence permit and that his removal from the State party would constitute arbitrary interference with his rights as enshrined in article 17 of the Covenant.

State party's observations on admissibility and merits

4.1 By a note verbale of 28 November 2011, the State party submitted its observations on admissibility and merits.

4.2 The State party informs the Committee that the admission, residence and expulsion of aliens are regulated by the Aliens Act 2000, the Aliens Decree 2000, the Regulation on Aliens 2000 and the Aliens Act 2000 Implementation Guidelines. The State party carries out a restrictive admission policy and aliens are eligible for admission only on the basis of the criteria established by section 13 of the Act; on the basis of obligations under international law; if the alien's presence is of essential interest for the Netherlands; or for compelling reasons of a humanitarian nature. No admission can be derived from illegal residence in the State party's territory, that is, residence without a residence permit.

4.3 A request for a residence permit will be rejected in accordance with section 16 1 (a) of the Act and article 3.71 of the Aliens Decree, if the alien does not possess a valid provisional residence permit (MVV) for the same purpose as that for which the residence permit was requested. Under the system established by the Act and the Aliens Decree, the MVV requirement applies only to an application for an initial residence permit. An application that must reasonably be seen as an application for continued residence will not be rejected because the applicant does not possess a valid MVV. Article 3.71 (2), opening words and (l), of the Aliens Decree exempts from this requirement aliens whose expulsion would conflict with article 8 of the European Convention on Human Rights. When assessing a request, the authorities take into account the nature and strength of the social ties made in the State party, the length of the alien's stay and the level of uncertainty as to his or her residence status. In addition, article 3.71 (4) of the Aliens Decree contains a so-called "hardship clause" that allows for exemptions from the MVV requirement if its application in a particular case may result in an exceptional case of unfairness.

4.4 As to the facts of the communication, the State party notes that the author's age as indicated in his communication is not correct; that an age analysis, carried out in the course of the asylum proceedings, revealed that he was born prior to the date stated; and that he was assigned 1 January 1981 as his date of birth. On 4 January 2006, the author acknowledged the outcome of the age analysis. In the District Court's judgment of 19 July 2007, the Court established that the author's age was no longer in dispute and that he was over 20 years of age when he submitted his asylum application.

4.5 With regard to the length of the asylum procedure, the State party maintained that, although it was not expeditious, the author's request for asylum had been examined in depth and that effective legal protection had been provided. During the procedure, it was established that the author's account and reasons for seeking asylum were implausible. He had failed to submit any documents, given an incorrect date of birth, and provided very vague and general statements about his reasons for fleeing Angola.

4.6 The State party maintains that the ties that an alien builds up in the State party do not necessarily mean that he will ultimately be entitled to residence or that his right to a private life would be violated if he were deported. In the author's case, he had been living for more than six years in the Netherlands when he submitted his request for a regular residence permit. However, he failed to show that he had close ties with the country. According to the State party, he did not further substantiate his claim to have joined the Jehovah's Witnesses church, for instance, by providing information on the role this belief plays in his life and the form it takes. Nor did he give further information regarding his

football club membership. The author had studied electrical engineering for only 18 months and did not complete his studies.

4.7 The author has lived most of his life in his country of origin. His ties with Angola, where he was born, brought up and spent his formative years, are stronger than his ties with the Netherlands. The State party points out that he was 20 years old when he arrived in the Netherlands, that his mother tongue is Portuguese, and that there is no evidence that his ties with Angola have been broken. There is therefore no reason why the author would not be able to resume his life in his country of origin.

4.8 The State party points out finally that the author has never been issued a residence permit; and that the fact that the asylum decisions were overturned by the court does not mean that the author could reasonably expect to be granted residence on that basis.

Author's comments on the State party's observations

5.1 On 6 February 2012, the author submitted his comments on the State party's observations and reiterated his allegations of a violation of his rights under article 17 of the Covenant.

5.2 The author holds that the State party's observations regarding his age and his acknowledgment thereof in the course of the domestic proceedings, on 4 January 2006, are correct. However, in later decisions the immigration authorities always mentioned 20 May 1985 as his date of birth. In view of the above, he claims that the State party cannot maintain before the Committee that he was older than 16 years when he entered its territory.

5.3 The author claims that the length of his stay in the Netherlands, seven years, is sufficient evidence that he has developed ties with the country, in particular since it results from the undue delay in the proceedings during which his asylum request was examined. The activities in which he has engaged in the State party are to be considered complementary evidence of his ties.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that, on 14 December 2009, the author lodged an application before the European Court of Human Rights. On 1 June 2010, the Court declared the application inadmissible since it was not submitted within the prescribed time-limit. Under article 5 (2) (a) of the Optional Protocol, however, the Committee is not precluded from examining the present communication, as the issue is no longer being examined by the Court. Accordingly, the Committee considers that it is not precluded from considering the present communication under article 5 (2) (a) of the Optional Protocol.

6.3 The Committee notes the author's allegations that he has developed personal and social ties in the State party during the six years that his request for asylum was pending before the immigration authorities, and that his removal to his country of origin would constitute a violation of his rights under article 17 of the Covenant. To illustrate his ties with the State party, the author refers mainly to the length of the asylum procedure, allegedly attributable to the State party. He notes in addition that during this period he studied electrical engineering, joined the Jehovah's Witnesses church, became a member of a football club and formed a group of friends. The Committee observes that the author's request for a temporary regular residence permit was rejected pursuant to section 16 (1) of

the Aliens Act, since he did not hold a valid temporary regular residence permit (MVV); and that he was never granted a residence permit in the State party. In view of the circumstances of the present case, the Committee considers that the author's allegations remain general and that he has failed to explain before the Committee why his removal to his country of origin would be a disproportionate measure, resulting in arbitrary interference with his rights under article 17. Accordingly, the Committee considers that the author has failed to sufficiently substantiate his claims of violation of article 17 for the purposes of admissibility and finds them inadmissible pursuant to article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.